Supreme Court, U.S.
FILED
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141

No. 09-369

In The

Supreme Court of the United States

DAWN MAGGARD and DARRELL MAGGARD,

Petitioners,

v.

FORD MOTOR COMPANY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Court should grant the petition, vacate the court of appeals judgment, and remand the case for further consideration in light of this Court's recent decision in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009).

2. If *Shinseki* did not determine the allocation of the burden of persuasion on harmless error in a civil appeal, the question presented is:

   In a civil appeal, does the appellant or the appellee bear the burden of persuasion on the harmless error issue?

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Petitioners Dawn and Darrell Maggard respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-31) is reported at 320 Fed. Appx. 367. The ruling of the district court on the petitioners' motion in limine to exclude hearsay testimony (App. 34-36) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2009. The Maggards' timely petition for rehearing was denied on June 26, 2009. This petition is timely filed within 90 days from that date. Sup. Ct. R. 13.3. This Court has jurisdiction under 28 U.S.C. § 1254 to review the judgment of the court of appeals on a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS

There are no constitutional or statutory provisions directly involved.

STATEMENT OF THE CASE

This is a product liability case involving a Ford Windstar van. A central issue at trial was the cause of the van's sudden, unexpected backward movement. Ford contended that the van was left in reverse. The Maggards contended that the van appeared to be in park, and slipped from "illusory park" into reverse. An investigating police officer concluded that Dawn Maggard slipped getting into the van and pulled the gearshift from park into reverse. The trial court excluded testimony from the officer about statements made to him during an interview because the statements were hearsay.

On April 7, 2009, the Sixth Circuit Court of Appeals issued a 2-to-1 decision holding that the exclusion of this testimony was error. (App. 19). The majority opinion further held that a new trial was required because it was impossible to know the effect the excluded testimony would have had on the jury. (App. 20). This decision placed the burden of persuasion on the harmless error issue on the appellees, the Maggards. The dissenting opinion placed the burden of persuasion on Ford, the party claiming error, and determined that the error was harmless. (*See* App. 26-28).

On April 21, 2009, this Court decided *Shinseki v. Sanders*, 129 S. Ct. 1696, holding that the burden of persuasion on the question of harmless error in a civil appeal is on the party alleging error – the appellant. *Id.* at 1705-06. Although *Shinseki* involved review of

an administrative proceeding, the Court held that the Court of Appeals for Veterans Claims was required to apply the same kind of harmless error rule that courts ordinarily apply in civil cases. *Id.* at 1704. The Court therefore applied general case law governing application of the harmless error rule in civil appeals. *Id.* at 1704, 1706. The Court determined that appellants in administrative proceedings and civil appeals have the burden of showing that prejudice resulted from an erroneous ruling. *Id.* at 1705-06. The Court further explained that it has placed the burden on the appellee to prove that an error "did *not* cause harm" only when the matter underlying review was criminal. *Id.* at 1706 (emphasis in original). The Court held that this reversal of the burden of persuasion is not justified in the ordinary civil case. *Id.*

REASONS FOR GRANTING REVIEW

A. This case meets the Court's customary criteria for issuance of a GVR order.

Under 28 U.S.C. § 2106, this Court has the power to grant the petition, vacate the judgment, and remand ("GVR") a case when an intervening event "alters the basis upon which the judgment rests." *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 161 (1945) (Douglas, J., dissenting). Where a decision of a court of appeals is called into question by an intervening development, such as a recent decision of

this Court, it has been "an integral part of this Court's practice" to issue a GVR order and allow the court of appeals to reconsider its decision in light of the intervening precedent. *See Lawrence v. Chater*, 516 U.S. 163, 166-67 (1996). In fact, this Court "routinely" issues GVR orders in cases "affected by one of [its] own intervening decisions" without regard to the intrinsic importance of the case. *Thomas v. American Home Prods., Inc.*, 519 U.S. 913, 915 (1996) (Scalia, J., concurring).

This Court explained in *Lawrence* that a GVR is "potentially appropriate" where, in light of an intervening development that "the court below did not fully consider," there is "a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration" and "it appears that such a redetermination may determine the ultimate outcome of the litigation." 516 U.S. at 167. The Court added that "[w]hether a GVR order is ultimately appropriate depends further on the equities of the case," including whether "the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court." *Id.* at 167-68. This case meets all criteria for exercise of the Court's discretionary authority to issue a GVR order.

1. The court of appeals did not have the opportunity to consider *Shinseki*.

The court of appeals issued its opinion on April 7, 2009. This Court issued its opinion in *Shinseki* on April 21, 2009. The court of appeals did not, therefore, have the opportunity to consider *Shinseki*.

2. There is a reasonable probability that the court of appeals decision rests on a premise it would now reject if given the opportunity to reconsider its decision in light of *Shinseki*.

The court of appeals majority opinior places the burden of persuasion on the appellees by considering whether it could say with "fair assurance" that the verdict "was *not* substantially swayed by the error." (App. 19-20) (emphasis added); *compare Shinseki*, 129 S. Ct. at 1706 (stating that the Court has placed the burden of proving that an error "did *not* cause harm" on the appellee only in criminal matters) (emphasis in original). The majority determined that it was "impossible to say" how the jury would have reacted to the excluded testimony, and it therefore determined that the error was harmful. (App. 20-21). Taking these statements at face value, allocation of the burden of persuasion was dispositive.

This conclusion is strengthened by comparing the majority opinion to the dissenting opinion. Instead of asking for assurance that the verdict "was not" affected by the error, the dissenting opinion asks

whether it is likely that the verdict "was" affected by the error, thereby placing the burden on persuasion on the appellant. (App. 26-27). Having allocated the burden of persuasion differently, the dissent reaches a different result. (App. 28).

Although it is not certain that allocation of the burden of persuasion was dispositive, certainty is not necessary. This Court requires only a reasonable probability that the lower court relied on the point at issue, *Lawrence*, 519 U.S. at 167, or that the intervening decision would affect the outcome on remand. *See Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 895-96 (1997).

On reconsideration, the court of appeals would have good reason to conclude that the exclusion of the trial testimony was harmless. The excluded testimony indicated that Maggard accidently pulled the gearshift from park to reverse, causing the accident at issue. But this theory is inconsistent with the testimony of Ford's expert witnesses and with Ford's contentions in the final pretrial order. First, according to both of Ford's expert witnesses, Maggard would not have been able to pull the gearshift out of park if the engine had been running. And according to Ford's contentions in the final pretrial order, the engine was running. Second, Ford contended in the final pretrial order that Maggard never shifted the van into park. And if the van was never shifted *into* park, it could not have been shifted *out of* park. Therefore, under Ford's version of the facts, and

according to Ford's expert witnesses, the jury would have had to reject the theory that Maggard pulled the gearshift from park to reverse.

3. The harmless error issue is dispositive.

The purpose of the harmless error rule is to determine whether a trial error requires reversal. Resolution of the harmless error question is therefore dispositive. If the court of appeals were to properly allocate the burden of persuasion and conclude that the trial court's error was harmless, it would affirm the jury verdict rather than vacate it.

4. The equities favor issuance of a GVR order.

The equities strongly favor issuance of a GVR order in this case. First, the cost of a remand to correctly decide the harmless error issue is more than justified by the potential benefits of avoiding an unnecessary retrial. *See Lawrence*, 516 U.S. at 167-68 (holding that the Court should consider the potential cost and benefits of a remand). Second, a remand would promote fairness by allowing full consideration of the case in light of all pertinent considerations. *See Stutson v. United States*, 516 U.S. 193, 197 (1996). Third, a remand would respect the dignity of the court of appeals by enabling it to consider a potentially relevant decision that was not previously before it. *See id.* Fourth, a remand would alleviate the potential for unequal treatment that is inherent in

the Court's inability to grant plenary review of all pending cases raising similar issues. *See Lawrence*, 516 U.S. at 166-67.

B. If *Shinseki* does not govern this case, the Court should grant plenary review to resolve the circuit conflict over proper allocation of the burden of persuasion on harmless error in civil cases.

Although *Shinseki* involves an appeal from an administrative proceeding, it explicitly applies the law applicable to ordinary civil appeals regarding allocation of the burden of persuasion on harmless error. 129 S. Ct. at 1704, 1706. That law provides that the burden of persuasion is on the appellant. *Id.* at 1705-06. But if the Court should nevertheless conclude that *Shinseki* does not directly hold that in civil appeals the burden of persuasion on harmless error is on the appellant, the Court should grant plenary review to decide how the burden should be allocated. Review would be appropriate because of widespread conflict between and within the federal circuit courts of appeals on the question.

Before *Shinseki*, nine circuits held that the appellant in a civil appeal has the burden of persuasion on harmless error.[1] Two circuits held that the

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[1] *See In re Watts*, 354 F.3d 1362, 1369 (Fed. Cir. 2004); *Tesser v. Board of Educ. of the City Sch. Dist.*, 370 F.3d 314, 319-20 (2d Cir. 2004); *Dresser-Rand Co. v. Virtual Automation Inc.*,

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appellee has the burden of persuasion.[2] The Sixth and Ninth Circuit Courts of Appeals had conflicting decisions on the proper allocation of the burden of persuasion.[3] Such a direct, persistent conflict is

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361 F.3d 831, 841-42 (5th Cir. 2004); *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 843 (8th Cir. 2003); *Rogers v. City of Chicago*, 320 F.3d 748, 751 (7th Cir. 2003); *Cigna Ins. Co. v. Oy Saunatec, Ltd.*, 241 F.3d 1, 8 (1st Cir. 2001); *Frederick v. Kirby Tankships, Inc.*, 205 F.3d 1277, 1285 (11th Cir. 2000); *Morrison Knudsen Corp. v. Fireman's Fund Ins. Co.*, 175 F.3d 1221, 1239 (10th Cir. 1999); *Burkhart v. WMATA*, 112 F.3d 1207, 1214-15 (D.C. Cir. 1997).

[2] *See Taylor v. Va. Union Univ.*, 193 F.3d 219, 235 (4th Cir. 1999) (en banc), *abrogated on other grounds by Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003) (requiring a fair assurance that the error did not substantially sway the judgment); *McQueeney v. Wilmington Trust Co.*, 779 F.2d 916, 917, 927 & n.19 (3d Cir. 1985) (holding that the same standard applies in civil and criminal cases, and requiring a high probability that the error did not affect the judgment). *See also* Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review*, at 87 (2007) (identifying the Third, Fourth, and Ninth Circuit Courts of Appeals as courts placing the risk of appellate uncertainty on the appellee).

[3] *Compare Tompkin v. Philip Morris USA, Inc.*, 362 F.3d 882, 897 (6th Cir. 2004) (affirming because "Tompkin has not shown that she was prejudiced by the district court's ruling.") *with Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 410 (6th Cir. 2006) (reversing because "it is impossible to conclude with any certainty that Stein's testimony did not sway the jury's verdict"); *compare Phoenix Eng'g & Supply Inc. v. Universal Elec. Co.*, 104 F.3d 1137, 1142 (9th Cir. 1997) ("'[T]he burden of showing that prejudice has resulted' [from the error] is on the party claiming injury from the erroneous rulings.") (quoting *NLRB v. Lee Office Equip.*, 572 F.2d 704, 708 (9th Cir. 1978)) *with Obrey v. Johnson*, 400 F.3d 691, 700 (9th Cir. 2005) (recognizing prior inconsistent decisions, and holding that "when

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appropriate for resolution by this Court. *See* Sup. Ct. R. 10(a).

CONCLUSION

The Court should grant the petition, vacate the judgment of the court of appeals, and remand the case for further consideration in light of *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009). In the alternative, the Court should grant plenary review to determine the proper allocation of the burden of persuasion on harmless error in civil appeals.

Respectfully submitted,

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reviewing the effect of erroneous evidentiary rulings, we will begin with a presumption of prejudice").

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

No. 07-6494

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAWN MAGGARD and DARRELL MAGGARD,	)	**ON APPEAL FROM**
	)	**THE UNITED**
Plaintiff-Appellees,	)	**STATES DISTRICT**
	)	**COURT FOR THE**
v.	)	**MIDDLE DISTRICT**
	)	**OF TENNESSEE**
FORD MOTOR COMPANY,	)	
	)	**MEMORANDUM**
Defendant-Appellant.	)	**OPINION**

(Filed Apr. 7, 2009)

Before: SILER and McKEAGUE, Circuit Judges; LUDINGTON, District Judge.*

McKEAGUE, Circuit Judge. Ford Motor Company ("Ford") appeals a jury verdict in favor of Dawn and Darrell Maggard. The jury found Ford strictly liable for injuries sustained by Dawn Maggard ("Dawn") after her leg was trapped under her Ford Windstar van as it unexpectedly began to roll backwards out of her driveway. The jury awarded $3,400,000.00 in

* The Honorable Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

compensatory damages[1] and $9,000,003.00 in punitive damages.

Ford advances three issues on appeal. First, Ford argues that the district court erroneously excluded statements by Dawn's then ten-year old daughter, Holly Maggard ("Holly"), regarding the events leading to Dawn's injury. Second, Ford asserts that the award of punitive damages was unwarranted under Tennessee law because the Maggards did not demonstrate by clear and convincing evidence that Ford acted recklessly. Third, Ford argues that the award of punitive damages violates Ford's due process rights. For the reasons set forth below, we reverse the district court's exclusion of Holly's statements, vacate the jury's verdict and award of damages, and remand the case for a new trial.

I

This case arises from events that occurred on the evening of May 24, 2004. Dawn and her two daughters, Holly and Audrey, were preparing to travel from their home to a local store. They left their house and went to the Maggards' Ford Windstar van. What happened after they approached the Windstar is disputed by the parties; however, both parties agree that the Windstar began rolling backwards. As the

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[1] The district court reduced the amount of compensatory damages to $2,720,000.00 in light of the jury's finding that Dawn was twenty percent at fault.

Windstar began rolling, Dawn's leg was trapped underneath one of the Windstar's tires. Holly and Audrey screamed as they watched the Windstar pull Dawn with it as it rolled down the driveway and came to a stop in the ditch across from the Maggards' house. Officer James Capps later stated that the accident left "evidence of blood and skin . . . on the driveway and the roadway."

Once the Windstar stopped, Holly and Audrey ran toward Dawn. Holly tried to lift the Windstar off Dawn. Holly then climbed over Dawn, entered the Windstar, placed the gearshift into park, and took the keys out of the ignition. She ran into her home and called 911 on two phones. She put down the phones before the 911 operator answered, leaving the lines open, so that she could rush back to check on her mother. After neighbors came to the scene of the accident, Holly ran to a neighbor's house, where she and Audrey stayed that night. Emergency personnel responded after Holly had left, and they administered medical care to Dawn. Despite their efforts, Dawn's leg was later amputated.

How the Ford Windstar began rolling down the driveway, trapping Dawn's leg and causing Dawn's injury, is the issue at the center of this lawsuit. There are two competing accounts: one offered by Dawn during her testimony at trial and by Holly during her deposition, the other offered by Holly shortly after the accident in response to questions from a police officer.

According to Dawn's testimony and Holly's deposition, the accident occurred as follows. The Windstar was parked in the driveway of the Maggards' home. Dawn, Holly, and Audrey left their house to get into the Windstar. Dawn entered the Windstar, started the ignition, and backed up the Windstar a few feet to allow her daughters space to walk around to the other side of the Windstar. After backing the Windstar up a short distance, Dawn realized that she needed to return to the house to place the family dog into a kennel. She moved the Windstar's gearshift lever into the park position, left the engine on, and removed her foot from the brake pedal. She exited the Windstar, and it remained stationary. As Dawn walked toward the house, Holly yelled that the Windstar was moving backward down the sloped driveway. Dawn ran to the driver's side door and attempted to enter the Windstar. Unable to stop the Windstar and concerned that it might hit Audrey, Dawn attempted to steer the Windstar away from Audrey. As she did that, the Windstar continued to move backwards down the driveway, trapping Dawn's leg under one of its wheels. Dawn offered this account throughout the litigation, and Holly provided a substantively identical account at her deposition.[2]

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[2] At her deposition, Holly stated that her mother started the Windstar and then went to the house to put the dog in the kennel. Holly further stated that she had yelled to her mother that the Windstar was rolling backward and that her mother had run back to the Windstar and had tried to jump in and turn the Windstar away from Audrey. Holly acknowledged, however,

(Continued on following page)

The alternate explanation of the accident arose from statements Holly made to the police just after the accident. Officer James Capps responded to the emergency call and arrived at the scene to investigate the accident. When he arrived, Dawn had already been taken away in an ambulance. Officer Capps examined the scene and questioned those present about the accident. After learning that Holly and Audrey were nearby at a neighbor's house, Officer Capps went to see them. He interviewed Holly approximately thirty to forty minutes after she left the scene of the accident. His report provided as follows:

> [T]he witness, the driver's ten-year-old daughter . . . stated her mother was going to drive her and her little sister to Walgreens. Witness stated her mother was getting in the driver's seat while she and her sister walked around to the passenger side. Witness stated her mother was halfway in the van when she slipped. Witness stated her mother grabbed the gearshift [sic] as she slipped and the van went into reverse. The van was parked at the top of driver's inclined driveway and began rolling backwards. Witness stated her mother could not keep up to get in and, as she struggled, the van turned and the driver's leg was pulled under the front and dragged

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that she provided a different account of the accident to Officer Capps, though she could not remember what it was. At trial, Holly stated that she could not see anything that happened as her mother entered the van.

> . . . and victim fell out of the van and was trapped under the van as it came to rest in the ditch across the street.

According to Officer Capps's report, Dawn was wearing flip-flops or sandals that became lodged inside of the vehicle while she was entering the Windstar.

At his deposition, Officer Capps provided the following description of Holly's demeanor at the time that she spoke with him: "I don't recall her being very upset and having difficulty talking to me, I mean, other than naturally being upset about what had just happened. And I do kind of recall thinking that she probably didn't really know at the time the seriousness of it."

On May 9, 2005, the Maggards filed a complaint advancing, inter alia, negligence and strict liability claims against Ford. The complaint also identified the Maggards' minor children, Holly and Audrey, as plaintiffs. The Maggards alleged that the accident occurred because the transmission would occasionally rest on the "land" between reverse and park. The Maggards referred to this as "illusory park." They contended that illusory park would lead the driver to believe that the gearshift lever was in the park position, though the gearshift lever could still slip into the reverse position, engaging the transmission and allowing the Windstar to roll backwards.

On December 15, 2006, the Maggards filed twelve motions in limine, including a motion to exclude Holly's statements made to the investigating officer.

On December 21, 2006, presumably recognizing that Holly's statements to the police would be admissible as an admission by a party-opponent under FED. R. EVID. 801(d)(2), the Maggards requested that Holly and Audrey be voluntarily dismissed as plaintiffs pursuant to FED. R. CIV. P. 41(a). The district court dismissed Holly and Audrey on January 2, 2007. At the final pretrial conference, the district court granted the Maggards' motion in limine and excluded Holly's statements, concluding that the statements were no longer admissible as an admission by a party-opponent under FED. R. EVID. 801(d)(2). The district court also ruled that Holly's statements were not admissible under the excited utterance exception, FED. R. EVID. 803(2), or present sense impression exception, FED. R. EVID. 803(1). The district court stated that Ford could ask Holly about the statements, but that Ford could not call Officer Capps to testify regarding the statements.

In the joint pretrial order, Ford advanced the theory that "[Dawn] was injured because she got out of the Windstar, leaving its engine running, and without putting it in Park, without removing the key from the ignition or without setting the parking brake, any one of which alone would have prevented this accident from occurring."[3] Ford's expert witnesses,

[3] Subsequent to the jury's verdict, Ford moved to amend the joint pretrial order pursuant to Federal Rule of Civil Procedure 16(e) by omitting the phrase "leaving its engine running, and without putting it in Park." The district court denied the motion.

Frederick W. King, III and Hugh J. Mauldin, Jr. found flaws in both Dawn's account and in Holly's statements to Officer Capps. They did both note, however, that the gearshift could be moved into reverse if someone slipped entering the Windstar, so long as the engine was off and the ignition was in "Off" rather than "Lock."[4] The district court excluded this testimony because there was no evidence in the record that the engine was off.

A jury trial commenced on July 17, 2007. Prior to the jury's verdict, Ford moved for judgment as a matter of law. Ford articulated a number of errors, including the district court's exclusion of Holly's statements. Subsequently, the jury returned a verdict finding the Windstar to be defective and Ford strictly liable for the Maggards' injuries. The district court issued a post-trial memorandum and order denying Ford's motion for judgment as a matter of law. Ford filed a notice of appeal on December 12, 2007.

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[4] The dissent notes that one of Ford's experts suggested that Holly's statements to Officer Capps were "not consistent with the operational characteristics of a 1999 Ford Windstar van." The dissent fails to note, however, that the expert continued on to note that the description of the accident in Holly's statements to Officer Capps were consistent with the operational characteristics of a Ford Windstar if the engine was off at the time of the accident.

II

"[E]videntiary decisions such as exclusion of hearsay" are generally reviewed under the abuse of discretion standard. *United States v. Hadley,* 431 F.3d 484, 496 (6th Cir. 2005) (citing *United States v. Schreane,* 331 F.3d 548, 564 (6th Cir. 1999)); *see also Schweitzer v. Teamster Local 100,* 413 F.3d 533, 538 (6th Cir. 2005). "An abuse of discretion will be found upon a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors.'" *Schreane,* 331 F.3d at 564 (quoting *Super Sulky, Inc. v. United States Trotting Ass'n,* 174 F.3d 733, 740 (6th Cir.1999)).

The district court excluded Holly's statements because it found that the statements were hearsay and that they did not fall within either the excited utterance or present sense impression exception to the hearsay rule. Ford contends that the district court conflated the exception for excited utterances with that of the exception for present sense impressions and that the statements were admissible as excited utterances. We find that the district court did not conflate the two exceptions. The factors for analyzing whether a statement is within the present sense impression exception and whether it is within the excited utterance exception are similar, and the district court appropriately considered both exceptions in assessing Holly's statements.

We also agree with the district court that Holly's statements did not fall under the present sense impression exception. Our analysis therefore turns on whether the district court abused its discretion in finding Holly's statements were not excited utterances. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." FED. R. EVID. 803(2). An excited utterance is considered trustworthy because "circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication." FED. R. EVID. 803 advisory committee's notes (citation omitted). A hearsay statement is admissible under the excited utterance exception if "(1) there [is] an event startling enough to cause nervous excitement; (2) the statement [is] made before there is an opportunity to contrive or misrepresent; and (3) the statement [is] made while the person [is] under the stress of the excitement caused by the event." *United States v. Beverly*, 369 F.3d 516, 539-40 (6th Cir. 2004) (citing *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050, 1057 (6th Cir. 1983)).

Courts consider these elements on "a case-by-case basis." *Haggins*, 715 F.2d at 1057. "All three inquiries bear on 'the ultimate question': 'Whether the statement was the result of reflective thought or whether it was a spontaneous reaction to the exciting event.'" *United States v. Arnold*, 486 F.3d 177, 184 (6th Cir. 2007) (quoting *Haggins*, 715 F.2d at 1058).

Put another way, the exception requires that "the speaker be 'under the sway of' a 'startling event' and that the statement be made before there is an opportunity 'to contrive or misrepresent.'" *United States v. Winters*, 33 F.3d 720, 723 (6th Cir. 1994) (quoting *Haggins*, 715 F.2d at 1057). "The assumption underlying [the] exception is that a person under the sway of excitement precipitated by an external startling event will be bereft of the reflective capacity essential for fabrication and that, consequently, any utterance he makes will be spontaneous and trustworthy." *Haggins*, 715 F.2d at 1057.

There is no dispute regarding the first element in the excited utterance analysis. Holly witnessed a serious accident that caused her mother significant harm. The last image she had of her mother before she left was her mother trapped under the family van in a ditch across the road from their home. It is abundantly clear from the record that the accident was sufficiently startling to cause nervous excitement, particularly in a 10-year-old girl involved in an accident with her mother, and therefore satisfied the first element. *See Beverly*, 369 F.3d at 539-40.

The district court did not appear to give serious consideration to the second element. The district court simply noted that thirty or forty minutes had passed between the accident and Holly's statements, without addressing whether the passage of time did or did not give Holly the opportunity to fabricate or misrepresent. The period between the startling event and the statement is relevant to determining whether

the statement was made before an opportunity to contrive or misrepresent arose.[5] *See Arnold*, 486 F.3d at 185. The excited utterance exception, however, does not contain an explicit time limitation. *Compare* FED. R. EVID. 803(1) *and* 803(2). Indeed, the opportunity to fabricate or misrepresent cannot be reduced to the simple passage of time. We have held that the excited utterance exception permits the admission of a statement made hours after the startling event. *See, e.g., United States v. Baggett*, 251 F.3d 1087, 1090 n.1 (6th Cir. 2001) (finding statements made several hours after startling event were excited utterances); *see also United States v. McCullough*, 150 F. App'x 507, 510 (6th Cir. 2005) (applying exception to statement made approximately two-and-a-half hours after startling event); *United States v. Green*, 125 F. App'x 659, 662 (6th Cir. 2005) (finding statement made three hours after startling event to be admissible as excited utterance in spousal assault because "trauma and anxiety . . . do not suddenly dissipate when the assailant leaves the scene"); *United States v. Tabaja*, 91 F. App'x 405, 410 (6th Cir. 2004) (holding that a statement made up to eleven hours after the startling event was an excited utterance). A court should therefore focus on whether the declarant had the opportunity to fabricate or misrepresent in

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[5] As will be discussed below, the time between the startling event and the statement can also affect the assessment of whether the declarant was still under the stress of the excitement of the event.

light of the circumstances of the event. *See* FED. R. EVID. 803(2) advisory committee's note ("[T]he character of the transaction or event will largely determine the significance of the time factor.") (quoting M.C. Slough, *Spontaneous Statements and State of Mind,* 46 IOWA L. REV. 224, 243 (1961)).

There is no basis in this record upon which the district court could conclude that Holly had an opportunity to fabricate. *See* KENNETH S. BROUN, GEORGE E. DIX, ET AL., MCCORMICK ON EVIDENCE § 272 n.30 (5th ed. 2006) (collecting cases in which courts found no opportunity to fabricate). Simply noting thirty to forty minutes had elapsed between the accident and the time of her interview by Officer Capps was insufficient. Holly had just seen her mother seriously injured. She had attempted to lift the Windstar off her mother. She had to climb over her mother to put the Windstar in park. Immediately after dialing 911, she ran back to check on her mother – without even speaking to the 911 operator. After neighbors arrived, she ran to a friend's house where, thirty to forty minutes later, she spoke with Officer Capps. There is simply no reason to believe that she would have recovered from that experience in the short time between the accident and her statements to Officer Capps. There is also absolutely no evidence in the record that anyone counseled her about how she should describe the accident or even that she discussed the accident in any detail with anyone, including her father who, it appears, had yet to arrive at the neighbor's house. Additionally, the substance of

her statements indicated that she thought that her mother was responsible for the accident. *See Gross v. Greer,* 773 F.2d 116, 120 (7th Cir. 1985) ("There is no reason to believe her statement to the officer was made with any premeditation, design or reflection."). It is highly improbable that, given the opportunity to fabricate or misrepresent, Holly would seize the opportunity to concoct a statement that indicated that she thought that her mother was at fault as opposed to a statement attempting to protect her mother.

The district court also failed to fully analyze the third element. The third element asks whether the declarant made the statement under the stress of the excitement caused by the event. *Beverly,* 369 F.3d at 539-40. Relevant factors in determining whether a speaker remains under the stress of the excitement include "(1) the lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements." *United States v. Jennings,* 496 F.3d 344, 349 (4th Cir. 2007) (quoting *Morgan v. Foretich,* 846 F.2d 941, 947 (4th Cir. 1988)); *see also Haggins,* 715 F.2d at 1058 (stating that factors such as age, physical condition, and mental condition affect the determination whether a declarant remains under the stress of the event); *United States v. Iron Shell,* 633 F.2d 77, 85-86 (8th Cir. 1980). Rather than considering these factors, the district court simply concluded that Holly "was calm." An examination of these factors, however, indicates that, whether or not

the district court is correct to conclude from Officer Capps's description of Holly's demeanor that she "was calm," Holly appears to have clearly been under the influence of the stress of the excitement of the accident when she made her statement to Officer Capps.

A review of the record as a whole strongly indicates that Holly was still under the stress of the excitement of the accident. *See Tabaja*, 91 F. App'x at 410 (finding that the nature of the startling event justified applying excited utterance exception to a statement made up to eleven hours after the event). Holly witnessed her mother pulled underneath the Windstar and dragged down the driveway and across the street. According to her mother, Holly was screaming as the accident occurred. The accident left blood and skin on the driveway, and Holly heard her mother yelling as Holly climbed over her to turn off the Windstar. The inference that Holly was affected by the accident is further supported by the fact that she did not even wait to speak to the 911 operator before running back to check on her mother. Additionally, Holly left the scene of the accident before learning whether her mother was safe. There is no suggestion that she had been comforted by her neighbors, told that her mother would be fine, told that her mother was not in any danger, or been comforted by her father who, it appears, had yet to arrive. In fact, Officer Capps concluded that Holly was still "naturally upset" when he spoke with her. The nature of the event itself therefore strongly supports a finding that Holly would have remained under the stress of

the excitement of the event for a significant period of time.

The district court also does not appear to have considered Holly's age in assessing whether Holly was still under the stress of the excitement of the event. Holly was ten years old at the time of the statements and had just witnessed her own mother dragged down their driveway by the Windstar. Witnessing such an accident involving a parent would presumably affect a child regardless of age, but it seems to us indisputable that a ten-year-old child would be more profoundly affected than someone older and better equipped to deal with seeing a parent incapacitated and in great pain.[6] Accordingly, Holly's age also indicates that she was under the stress of the excitement of the event when she spoke to Officer Capps.

The remaining factors also indicate that Holly remained under the stress of the accident. The subject matter of Holly's statements was the accident that injured her mother. When the subject matter of the statement involves the startling event itself, the subject matter supports a finding that the declarant

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[6] The dissent suggests that Holly may not have fully grasped the severity of her mother's injury. Though Holly may not have known her mother's life was in danger, there simply can be no argument that she was unaware her mother was injured and in a great amount of pain. A ten-year-old child aware her mother had been hurt in such a serious accident would still be under the stress of the excitement of the accident a half-hour later regardless of whether she knew that her mother's life was in danger.

was still under the stress of the accident. *See United States v. Alexander,* 331 F.3d 116, 123 (D.C. Cir. 2003) (quoted in *Arnold,* 486 F.3d at 186). Similarly, though some time elapsed between the accident and Holly's statements, it was clearly not enough time to take Holly outside the influence of the stress of witnessing the accident.

Finally, contrary to the district court's assessment of Holly's physical condition and state of mind, we find that Holly's physical condition and state of mind also indicate that she was under the stress of the excitement of the accident when she spoke with Officer Capps. While the district court concluded that Holly "was calm," it based its conclusion on a quote from Officer Capps's deposition taken out of context. In response to a question regarding Holly's demeanor, Officer Capps stated, "I don't recall her being very upset and having difficulty talking to me, I mean, other than naturally being upset about what had just happened. And I do recall thinking that she probably didn't really know at the time the seriousness of it." Nowhere in his deposition does Officer Capps describe Holly as "calm." In fact, Officer Capps clearly stated that Holly was "naturally upset about what happened."[7]

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[7] The dissent argues that there was a reasonable basis in the record to support the district court's conclusion that Holly was calm. We disagree. Officer Capps's answer is not a model of clarity, but it unambiguously indicates that Holly was upset. While it is possible the district court relied on the beginning of

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Additionally, even if Holly had not manifested any outward indications of her state of mind, it is simply implausible that a ten-year old in this situation would be calm. When a child witnesses her parent suffer a serious injury and then displays no outward emotion, shock – not calm – would be the best assessment of her state of mind. And a statement made while in shock is an excited utterance. *See Haggins* 715 F.2d at 1058; *United States v. Sewell,* 90 F.3d 326, 327 (8th Cir. 1996) ("The justification for the 'excited utterance' exception . . . derives from the teaching of experience that the stress of nervous excitement or physical shock 'stills the reflective faculties.'") (quoting *United States v. Elem,* 845 F.2d 170, 174 (8th Cir. 1988)).

In conclusion, every possible factor in assessing the third element of the excited utterance exception to the hearsay rule about which the record provides information indicates that Holly was under the stress of the accident.[8] The district court either did not

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Officer Capps's statement, "I don't recall her being very upset," that was not the entirety of his statement, much less the entirety of the record. Officer Capps noted Holly was naturally upset, and the natural level of distress at witnessing a parent seriously injured is unquestionably high. The district court thus clearly misconstrued the record in finding that Holly "was calm" at the time she spoke with Officer Capps.

[8] The district court also referred to the fact that Holly's statements were made in response to questioning. Statements made in response to questioning are still excited utterances. *United States v. Joy,* 192 F.3d 761, 767 (7th Cir. 1999); *United States v. Glenn,* 473 F.2d 191, 194 (D.C. Cir. 1972). Further,

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consider the relevant factors or did not apply them correctly to the case at hand. Its failure to correctly assess whether Holly remained under the stress of the excitement of the accident, paired with the clearly startling event and the lack of an opportunity for Holly to fabricate or misrepresent, gives us the firm conviction that the district court erred in its judgment that Holly's statements were not excited utterances. We are loath to reverse the district court on this issue,[9] but we cannot escape our firm conviction that the district court erred.

We find that the record compels the conclusion that the accident was a startling event, that thirty to forty minutes did not provide a ten-year-old girl who had just watched her mother seriously injured the opportunity to contrive or misrepresent, and that Holly was still under the stress of the startling event when she made her statements to Officer Capps.

We further find that the district court's error was not harmless. "The harmless-error standard provides

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Officer Capps testified that Holly "came right out and told me everything. I didn't have to pry information out of her or anything." This strongly suggests that any questioning by Officer Capps did not affect the spontaneity of Holly's statements.

[9] If the district court had heard live testimony regarding Holly's condition at the time of her statement to Officer Capps, we would be even more hesitant to reverse the district court's decision. However, that was not the case here. The district court excluded Officer Capps's testimony through a pretrial motion in limine, and it relied solely on the record as developed through discovery.

that if 'one cannot say, with fair assurance, . . . that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected.'" *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398, 409-410 (6th Cir. 2006) (quoting *DePew v. Anderson*, 311 F.3d 742, 751 (6th Cir. 2002)). The district court's error in this case limited the jury to only one plausible version of the events leading to Dawn's injury. It is impossible to say how the jury would have acted if there had been an alternate explanation of the events leading to Dawn's injury rather than only the version put forward by Dawn and Holly at trial. *See Nemir v. Mitsubishi Motors Corp.*, 381 F.3d 540, 558-60 (6th Cir. 2004) (exclusion of evidence of alternate narrative was not harmless error); *see also Hilyer v. Howat Concrete Co., Inc.*, 578 F.2d 422, 424 (D.C. Cir. 1978).[10]

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[10] The dissent suggests that even if excluding Holly's statements was error, the exclusion may not have affected Ford's substantial rights. In particular, the dissent suggests that the impact of Holly's statements would have been lessened by Holly's age and inexperience as a driver. We cannot agree. First, the dissent overlooks the probative weight Holly's statements would have as the most contemporaneous account of the accident. Second, the dissent engages in its own "highly debatable conjecture" by suggesting that arguments regarding the weight given to Holly's statements would have substantially diminished the effect of admitting Holly's statements. Based on the evidence at trial, the jury could find either that the gearshift slipped from "illusory park" into reverse after Dawn left the Windstar or that Dawn exited the Windstar while the Windstar was still in reverse. It is no surprise that, faced with this choice, the jury found the Maggards' theory more likely. Holly's statements, however, provide another explanation for the accident, which

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Additionally, Holly's statements regarding the accident were made immediately after the accident and are the most contemporaneous account of the accident available. They are thus powerful evidence of what in fact happened. Accordingly, the exclusion was not harmless error.[11]

III

The district court abused its discretion in excluding Holly's statements. Given the potential importance of an alternate explanation for the events leading to Dawn's injury, it cannot be said with fair assurance that the exclusion of Holly's statements did not affect the outcome of the trial. Thus, we **REVERSE** the district court's exclusion of Holly's statements as inadmissible hearsay and **REMAND** for the district court to grant a new trial.

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was that Dawn slipped upon entering the vehicle and pulled the gearshift from Park into Reverse. It is not conjectural to find that a jury may alter its judgment if provided another plausible account of the event at the center of the dispute. Certainly, we cannot say with fair assurance that the exclusion of Holly's statements did not affect the judgment.

[11] The error in excluding Holly's statements was further compounded by the district court's error in barring its admission even for impeachment purposes. The district court conceded in its order on Ford's motion for judgment as a matter of law that Officer Capps should have been allowed to testify to impeach Holly.

LUDINGTON, District Judge, dissenting. Respectfully, I write separately for three reasons. First, while decisions related to the law of evidence governing hearsay and its exceptions are to be reviewed applying the abuse of discretion standard, factual determinations made by the district court in applying that law are to be reviewed for clear error. The latter standard of review, in my view, is implicated here and I would find no error. Second, even if the district court erred in excluding Holly's out-of-court rendition of the events, Ford's substantial rights were not affected by the district court's exclusion of the statement from evidence. Finally, I would reverse the district court's determination that adequate evidence was presented to justify the jury's conclusion that Ford was "reckless" and that the Maggards were entitled to an award of punitive damages.

I

Extrajudicial statements carry a presumption of unreliability, *United States v. Clark*, 18 F.3d 1337, 1342 (6th Cir. 1994), because the declarant's statements are not given under oath in the presence of the fact finder or subject to cross-examination. 2 MCCORMICK ON EVIDENCE § 245 (Kenneth S. Broun ed., 2006) (citing *California v. Green*, 399 U.S. 149, 154 (1970)). Testimony subject to these conditions enables the finder of fact to evaluate a witness's perception, memory, narration, and sincerity to expose any inaccuracies. FED. R. EVID. Art. VIII, advisory committee's note (introductory note). The exceptions to the hearsay

rule, developed through the common law, "proceed[] upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." FED. R. EVID. 803, advisory committee's note. There is no disagreement that for a statement to be admitted under the excited-utterance exception to the hearsay rule that: "1) there be an event startling enough to cause nervous excitement; 2) the statement be made before there is an opportunity to contrive or misrepresent; and 3) the statement be made while the person in under the stress of the excitement caused by the event." *United States v. Beverly*, 369 F.3d 516, 539-40 (6th Cir. 2004).

Decisions about the facts of the case must, however, be made by the district court in order to apply the rules of evidence generally and, in this instance, to determine the applicability of the excited utterance exception to the hearsay rule. FED. R. EVID. 104(a) directs that district courts are to resolve "preliminary questions concerning . . . the admissibility of evidence." In contrast to most determinations about consequential facts, the court, rather than the jury, resolves preliminary issues of fact for the simple reason that it is necessary to insulate the jury from inadmissible evidence. 21A CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5052.1 (2d ed. 2005); *see also* 1 JACK B. WEINSTEIN AND MARGARET A. BERGER, FEDERAL EVIDENCE § 104.14(3) (Joseph M. McLaughlin, ed., 2d

ed. 1997). A court's factual findings pursuant to Rule 104(a) "must be established by a preponderance of proof." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 n.10 (1993) (citing *Bourjaily v. United States*, 483 U.S. 171, 175-176 (1987)); *see also United States v. Conrad*, 507 F.3d 424, 429 (6th Cir. 2007). The Sixth Circuit reviews findings made under Rule 104(a) for clear error. *Conrad*, 507 F.3d at 429.

Turning to Holly's statement in this case, the district court observed that the statement was made at the neighbor's house at least thirty minutes after the accident and that Holly was "not still in the emotional state in which she undoubtedly was at the time of the accident itself." (J.A. at 212-13). Certainly, the location and circumstances of Holly's statement, while not determinative, support the district court's decision that Holly was removed from the emotional impact of the accident. Lapses of time between the startling event and the statement are to be analyzed in context. The Sixth Circuit, for example, has concluded that a "nervous" statement made seven minutes after a police search and arrest not to be within the excited-utterance exception because the arrest would not create a period of excitement for that period. *United States v. McGhee*, 161 F. App'x 441, 445 (6th Cir. 2005) (unreported).

The district court may have taken Officer Capps's statement out of context and Holly may, in fact, have remained under the sway of the startling event. Indeed, Officer Capps indicated that Holly was "naturally . . . upset about what had just happened."

(J.A. at 328). However, as the district court observed, Officer Capps also testified that he did not "recall her being very upset" and that "she probably didn't really know at the time the seriousness of [the accident]." *Id.* Thus, Officer Capps's testimony reasonably supported the district court's conclusion that Holly was sufficiently removed from the emotional events of her mother's accident.

It is also true that the events of the accident were serious – e.g., Holly witnessed her mother being dragged by the vehicle, and Holly assisted her mother after the accident. However, Holly's statement was made according to her memory some thirty to forty minutes after the accident and after she walked a distance to a neighbor's house where she remained for the night.

Holly's age can also cut in more than a single way when examining the factors relevant to the excited utterance exception to the hearsay rule. While a young witness might be less likely to fabricate or shade facts, it is equally plausible that Holly's youthful age kept her from grasping the life-altering implications of her mother's injuries. In contrast to an adult, a ten-year-old child may not appreciate the gravity of such a horrific accident. Indeed, Officer Capps observed while taking Holly's statement that she did not appear to appreciate the "seriousness" of the accident. Again, while the evidence available to the district court could be interpreted more than one way, the district court's factual conclusions were grounded in the record.

. One concluding point should be made here. The district court decided that Holly's statement should be excluded from evidence at trial in response to a motion in limine based upon the parties' competing views of the discovery. The district court did not reach its decision based upon its impression of Holly's or Officer Capps's in-court testimony, but upon its evaluation of the deposition transcripts. However, the parties did not seek a hearing, nor did Ford contend that failing to grant a hearing was error. *See* FED. R. EVID. 104(c). More importantly, FED. R. EVID. 104(a) allocates the authority to resolve questions of preliminary fact to the district court in order to implement the rules of evidence and not because the trial judge is a superior finder of fact than a jury. Indeed, that principle would seem to be emphasized by the fact that in reaching decisions related to preliminary questions, with the exception of the rules related to privilege, the district court is "not bound by the rules of evidence." FED. R. EVID. 104(a) & 1101(d).

II

Even if the district court committed clear error in excluding Holly's statement, there is no reason to believe that admission of Holly's rendition of the events would have been material to the jury. FED. R. EVID. 103(a) provides that an erroneous exclusion of otherwise admissible evidence is inconsequential unless "a substantial right of the party is affected." An evidentiary error justifies the nullification of "a jury verdict

where the error so altered the total mix of information submitted to the jury that it was substantially likely to have affected the verdict." *Stockman v. Oakcrest Dental Ctr., P.C.*, 480 F.3d 791, 804 (6th Cir. 2007); *see also Rush v. Ill. Cent. R.R. Co.*, 399 F.3d 705, 723-24 (6th Cir. 2005).

While a child witness is presumed competent, trial courts are to remain alert to verify a child witness's ability to understand the significance of the oath and that the child maintains the capabilities of observation, recollection, and narration. FED. R. EVID. 601. Holly, as any witness with no driving experience, would likely be unfamiliar with the mechanics of a vehicle's transmission, the ignition-key interlock, or brake-shift interlock, and would be less likely to perceive the events in the same way as a witness with such experience. In my view, the suggestion that exclusion of Holly's testimony affected the substantial rights of Ford remains highly debatable conjecture.

More importantly, Ford's expert witness, Frederick W. King, III, acknowledged the possibility that Dawn could have shifted the transmission out of park when entering the vehicle, but only if the ignition had been turned off. He explained that the brake-shift interlock would have prevented Dawn from accidentally shifting the gearshift if the engine was running. However, there was no evidence that Dawn turned the engine off and no evidence that the vehicle rolled solely in response to the grade of the driveway. Indeed, the district court excluded King's opinion from being presented to the jury because the record did not

support the proposition that the vehicle's engine was off at the time of the accident. Ford proceeded to trial with its expert explaining to the jury that the Windstar's engine was operating and that the cause of the accident was Dawn's failure to place the transmission in park. Mauldin rejected Holly's statement to Officer Capps as "not consistent with the operational characteristics of a 1999 Ford Windstar van." (J.A. at 89). While a party may offer competing explanations for an event, it is difficult to conclude that Ford's "substantial rights" were affected by the omission of Holly's testimony.

III

The award of punitive damages should, in my judgment, be reversed. The Maggards did not advance evidence demonstrating fraudulent, malicious, oppressive, consciously indifferent, or reckless conduct. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992). "A person acts recklessly when the person is aware of, but consciously disregards, a substantial and unjustifiable risk of such a nature that its disregard constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances." *Id.* (citing Tenn. Code Ann. § 39-11-302(c)). Under this standard, punitive damages are only available for the "most egregious wrongs." *Id.* at 901. "The tort must be intentional or fraudulent or a species of recklessness that contains an element of conscious wrongdoing. Under Tennessee law, the plaintiff must show by clear and convincing

evidence that the defendant is aware of, but consciously disregards, a substantial and unjustifiable risk in a reckless way." *Cappello v. Duncan Aircraft Sales of Fl., Inc.*, 79 F.3d 1465, 1474 (6th Cir. 1996).

The Maggards did not meet the clear and convincing standard by demonstrating that Ford's conduct was reckless for many reasons. Neil Mizen, the Maggard's expert witness, testified that the vehicle was "unreasonably dangerous" because Ford did not incorporate a warning system that would have sounded the vehicle's horn. (J.A. at 264, 270). Mizen offered his opinion that the warning system would have prevented the accident, but he had not designed or tested his suggested warning system. (J.A. at 279).

In contrast, the record demonstrated that no other automobile manufacturer utilized the Maggards' expert's proposed warning system in 1999. Ford's technology was consistent with the most advanced practice observed by vehicle manufacturers. The Maggards' expert witness acknowledged both of these facts and provided the following testimony:

> Q: And all these vehicles except the one Toyota that you mentioned earlier could be placed in between Reverse and Park in what you call Illusory Park, and therefore all of those vehicles are defective and unreasonably dangerous in that regard. Isn't that right?
>
> A. To that extent, yes.

> Q: That would mean there are millions and millions of vehicles on the road today which are, in your opinion, defective and unreasonably dangerous with respect to the ability to place the transmission's controls between Reverse and Park, correct?
>
> A: Yes, it does.

(J.A. at 278). In order to find the Maggards' expert's opinion reasonable, one must accept the proposition that virtually every automobile manufacturer in the world was "reckless" in the design of their transmission.

Second, rather than installing a warning system, Ford demonstrated that it focused on improving the steering column and related transmission – a strategy that King testified that Ford believed was more effective in protecting Ford's customers. King's conclusion was grounded in Ford's prior experience with customer reaction to a similar warning system for seatbelts. While the district court noted King's potential bias, the Maggards only offered their expert's opinion to the contrary – which was not supported by testing to evaluate its effectiveness.

In addition, Ford's decision to improve the transmission selection mechanism rather than to install a warning system was consistent with the standards promulgated by National Highway Traffic Safety Administration and the Society of Automotive Engineers, and was otherwise consistent with federal regulations.

Finally, the record is devoid of any evidence that Ford chose not to install the warning system for purely financial reasons. While King agreed during cross-examination that a warning system might be constructed for an estimated expense of three dollars per vehicle, the Maggards did not offer any evidence that Ford based its decision on the expense of the proposed device rather than effective protection of the customer. King testified that improvements were made instead to the steering column. The Maggards' expert also acknowledged that the improvements to the steering column and gear shift lever were "good design[s]" intended to minimize occurrences of illusory park. (J.A. at 274-75, 288).

The evidence, in summary, did not demonstrate by clear and convincing evidence that Ford's conduct was reckless under Tennessee law and it did not warrant the award of punitive damages.

IV

For these reasons, I respectfully dissent and would affirm the district court's exclusion of Holly's statement, while reversing the award of punitive damages.

No. 07-6494

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DAWN MAGGARD AND DARRELL MAGGARD, Plaintiff-Appellees,	)	ORDER
v.	)	(Filed Jun. 26, 2009)
FORD MOTOR COMPANY, Defendant-Appellant.	)	

BEFORE: SILER and MCKEAGUE, Circuit Judges; and LUDINGTON,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the

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* Hon. Thomas L. Ludington, United States District Judge for the Eastern District of Michigan, sitting by designation.

petition is denied. Judge Ludington would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DAWN MAGGARD, et al, Plaintiffs,	)	
vs.	)	CASE NO. 3:05-0369
FORD MOTOR COMPANY, Defendant.	)	

TRANSCRIPT OF PROCEEDINGS
PRETRIAL CONFERENCE

BEFORE:	THE HONORABLE ALETA A. TRAUGER
DATE:	JANUARY 5, 2007
TIME:	10:00 A.M.

REPORTED BY: BEVERLY E. "BECKY" COLE, RPR CCR
A-837 U.S. COURTHOUSE
NASHVILLE, TN 37203
(615) 254-6727

* * *

[11] THE COURT: Yeah right. I think that I have ruled on everything - now, Holly.

MR. BAYDOUN: Holly.

THE COURT: Holly is no longer a party, so her statements are not admissions.

And until your recent reply and reading those excerpts from the officer's deposition and Holly's deposition, I thought initially that these would be excited utterances.

But having reviewed that testimony, they are not excited utterances. These statements were made, it seems, at least 30 minutes afterwards. She was really not aware of [12] the critical nature of her mother's condition at that time, it doesn't appear.

She was down the street at a neighbor's house where she spent the night. She was able to answer questions. She was calm. And so, you know, if it had been right, after it, she's on the driveway, her mother is still under the tire of the car, obviously that would be an excited utterance. But I don't see it as an admission, an excited utterance or a present tense impression. I just don't see it as anything.

So those statements will not come in through the officer, plus the officer is also somewhat unclear on who told him what because he was interviewing people at the scene too. And at some point in his testimony, he says, you know, I'm not sure who told me what because I was talking to a bunch of witnesses.

Holly told me that but, again, that was something that everybody there was telling me what had happened in the incident, and I would imagine the information I got from the firemen were from where they got from Holly and the mother.

But he doesn't know where he got anything, it doesn't sound like. Now, in some points of his deposition, he does say Holly told me this, Holly told me that.

MR. BIBB: Right.

THE COURT: But, you know, you may just have to call Holly.

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Supreme Court, U.S.
FILED
OCT 28 2009
OFFICE OF THE CLERK

No. 09-369

In The
Supreme Court of the United States

DAWN MAGGARD AND DARRELL MAGGARD,
Petitioners,

v.

FORD MOTOR COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Sixth Circuit reversed a jury verdict because the trial court abused its discretion by excluding an excited utterance providing the only evidence contradicting the petitioners' version of how an accident happened.

The question presented is whether the Sixth Circuit improperly allocated the burden of persuasion in deciding whether this error was prejudicial.

RULE 29.6 STATEMENT

Ford Motor Company has no parent corporation, and no publicly held company owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondent, Ford Motor Company ("Ford"), respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the Court of Appeals for the Sixth Circuit.

INTRODUCTION

In this case, the Sixth Circuit reversed and remanded for new trial because the trial court abused its discretion by excluding, on hearsay grounds, an excited utterance that provided "the most contemporaneous account of the accident available," Pet. App. 21 and the only "alternate explanation of the events" contradicting "the version put forward by [petitioners] at trial." Pet. App. 20. Given the importance of this admissible evidence in the total mix of information that the jury should have been able to consider, the Sixth Circuit logically concluded that its exclusion was not harmless. Pet. App. 19-21.

Largely conceding the narrow, case-specific nature of this decision, petitioners' primary request is that the Court vacate the Sixth Circuit's decision and remand for reconsideration based on the statement in *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009) that the appellant bears the "burden of persuasion" on the question of harmless error. Pet. App 2. But *Shinseki* made no new law in that regard. As petitioners concede, the Court merely "applied general case law governing application of the harmless error rule in civil appeals." Pet. 3. Indeed, *Shinseki* cited decisions from this Court going back to 1943 holding that the party claiming error bears the burden of showing prejudice. 129 S. Ct. at 1705. Because this principle long has

been established in the decisions of this Court, there is no reasonable possibility, much less probability, that the Sixth Circuit would reach a different decision on remand simply because it was reiterated in *Shinseki*.

Moreover, there is no hint in this case that the Sixth Circuit did not place the burden of persuasion on Ford or that allocating the burden of persuasion determined the outcome of the harmless error question. Petitioners rely on the Sixth Circuit's statement of the standard for determining that error was harmless as evidence that it placed the burden of persuasion on them. Pet. 5. But that standard is consistent with requiring the appellant to show prejudice, and it has been applied in that manner by the Sixth Circuit. Nothing the Sixth Circuit said suggests that it did not require Ford to persuade it that the error was harmful.

As *Shinseki* itself shows, moreover, allocation of the burden of persuasion will seldom determine the outcome of the harmless error inquiry. That burden requires only that the appellant "explain why the erroneous ruling caused harm" and "[o]ften the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said." 129 S. Ct. at 1706. The burden of persuasion creates no presumption, one way or the other, as to whether an error was harmless in a particular case. *Shinseki*, 129 S. Ct. at 1705 (harmless error must be determined by "case-specific application of judgment, based on examination of the record," not "mandatory presumptions and rigid rules.") Because the erroneously excluded evidence in this case was unique, not cumulative, and went to the most critical issue in

the case – how the accident happened – prejudice was readily apparent.

Because the decision below involves a fact-bound application of long-settled precedent, conflicts with no decision of any other court, and properly held that the trial court's erroneous exclusion of the only evidence contradicting the petitioners' version of material events was not harmless, the Court should deny the petition.

COUNTERSTATEMENT

Petitioner Dawn Maggard was injured when a Ford Windstar van rolled backwards trapping her leg and pulling her down her driveway. Pet. App. 3. Petitioners contended that the accident occurred because the transmission was in "illusory park" and spontaneously shifted into reverse after Dawn exited the vehicle with the engine running, and walked toward the back door of her house. Pet. App. 4. Critical to petitioners' claim against Ford was her testimony that the vehicle "remained stationary" when she left the vehicle – her evidence of so-called illusory park – and started rolling while Dawn was away from the vehicle – her evidence of a spontaneous shift to reverse. Pet. App. 3.

The only evidence contradicting this version of events was a statement made to the investigating police officer by Dawn Maggard's 10-year-old daughter, Holly, shortly after the accident. At that time, Holly said that the van started rolling when her mother "was halfway in the van," because she "slipped" and "grabbed the gearshift." Pet. App. 5. By the time of her deposition and trial, however, Holly had conformed

her version of the accident to that of her mother. Pet. App. 4.

Petitioners moved to exclude Holly's contemporaneous statement on the grounds that it was hearsay and, if admitted, would have a devastating effect on their case. Petitioners conceded that admission of Holly's statement "could control the outcome of this case," and if the jury believed Holly's contemporaneous statement "then Ford will win this case." R 107 and 108, Plaintiffs' Reply in Support of Fourth Motion in Limine at 11, and Motion for Leave to File Reply. The trial court granted the motion and precluded Ford from introducing any evidence of Holly's statement to the police officer, or even using it to impeach Holly when she testified at trial. Pet. App. 7, 21, fn. 11.

The Sixth Circuit, concluding that Holly's statement was an excited utterance that should have been admitted – a ruling petitioners do not challenge – held that given its importance in the context of this case, its exclusion was not harmless. Pet. App. 19-21. Petitioners filed a motion for rehearing and rehearing *en banc* arguing, among other things, that the court improperly placed the burden on them to establish that the error was harmless. Petition for Rehearing En Banc or for Panel Rehearing at 6. The Sixth Circuit denied the motion for rehearing because "the issues raised in the petition were fully considered upon the original submission and decision of the case." Pet. App. 32.

REASONS FOR DENYING THE WRIT

I. THERE IS NO REASON TO BELIEVE THAT THE SIXTH CIRCUIT WOULD DECIDE THE HARMLESS ERROR QUESTION DIFFERENTLY IN LIGHT OF *SHINSEKI*

Petitioners seek to invoke this Court's GVR power by arguing that, because *Shinseki* was decided two weeks after the decision in this case, the Sixth Circuit did not have the opportunity to consider *Shinseki's* statement that the appellant has the burden of persuading the court that an error was prejudicial. Pet. 2, 5. But *Shinseki* did not establish any new law on the burden of persuasion. The issue in *Shinseki* was whether a presumption of harmful error adopted by the Federal Circuit in veterans proceedings was consistent with the harmless error rule codified in the Veterans Court statute. *Shinseki*, 129 S. Ct. at 1704. Determining that the statute required "the same kind of 'harmless error' rule that courts ordinarily apply in civil cases," the Court compared the presumption to the ordinary harmless error rule, and found it inconsistent. *Id.*

Shinseki, therefore, broke no new ground regarding the proper application of the harmless error rule in civil cases. It merely applied well-established principles, including the principle that the party claiming error bears the burden of showing prejudice. *Shinseki*, 129. S. Ct. at 1705-06, citing, *inter alia*, *Palmer v. Hoffman*, 318 U.S. 109, 116 (1943). Thus, while the Sixth Circuit did not have *Shinseki's* statement of this principle at the time of its original decision, it had the benefit of many other cases from

this Court, and other federal courts, expressing the same principle. Because *Shinseki* did not change anything regarding the burden of persuasion, there is no reason to believe the Sixth Circuit would change its decision in light of *Shinseki*.

Petitioners, in fact, do not point to anything in the Sixth Circuit decision indicating that it did not place the burden on Ford to demonstrate that the exclusion of Holly's statement was prejudicial. Petitioners argue that the Sixth Circuit's articulation of the standard for determining harmless error – whether the court has "fair assurance" that the verdict "was not substantially swayed by the error" – implicitly put the burden of persuasion on them. But, the Sixth Circuit, applying the same standard, has recognized that the burden of persuasion is on the appellant. *See Beck v. Haik*, 377 F.3d 624, 635 (6th Cir. 2004) (noting appellant must "deprive the appellate court of fair assurance that the error was not outcome determinative"), *overruled on other grounds, Adkins v. Wolever*, 554 F.3d 650 (6th Cir. 2009). In fact, this is the standard articulated in *Kotteakas v. United States*, 328 U.S. 750, 765 (1946), which this Court relied on in *Shinseki* to describe how the harmless error rule should be applied. 129 S. Ct. at 1705. This articulation of the standard does not suggest that the Sixth Circuit failed to place the burden of persuasion on Ford.

In deciding the harmless error question, the Sixth Circuit focused on arguments advanced by Ford in its appellate briefs as to why the erroneous exclusion of Holly's statement was prejudicial, not harmless: (1) that the evidence was not cumulative, but provided the only description of the accident contradicting petitioners' version; (2) that excluding the evidence

limited the jury to a single version of the accident that supported petitioners' liability theory; and (3) that it was the only contemporaneous description of the accident made before the opportunity to fabricate. Pet. App. 19-21. The court also considered, and rejected as unpersuasive, certain arguments advanced by petitioners and the dissenting judge as to why the jury might have disbelieved Holly's statement, even if it had been admitted. Pet. App. 20, fn. 10.

In short, the Sixth Circuit found Ford's arguments as to why this evidentiary error was prejudicial to be more persuasive than the counter-arguments advanced by petitioners. This is all that the burden of persuasion requires, as this Court explained in *Shinseki*:

> To say that the claimant has the 'burden' of showing that an error was harmful is not to impose a complex system of 'burden shifting' rules or a particularly onerous requirement. In ordinary civil appeals, for example, the appellant will point to rulings by the trial judge that the appellant claims are erroneous, say, a ruling excluding favorable evidence. Often the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said. But, if not, then the party seeking reversal normally must explain why the erroneous ruling caused harm.

Shinseki, 129 S. Ct. at 1706.

Nothing in *Shinseki* remotely suggests that the Sixth Circuit improperly allocated the burden of

persuasion on the issue of harmless error, or that such an allocation made a difference in the ultimate conclusion. Because there is no reasonable possibility, much less probability, that the Sixth Circuit would reach a different conclusion in light of *Shinseki*, petitioners' request for a GVR order should be denied.

II. THIS CASE RAISES NO ISSUE REGARDING HARMLESS ERROR MERITING REVIEW BY THIS COURT

In their alternative request that this Court grant *certiorari*, petitioners posit that there is a split of authority among the federal circuits as to which party has the burden of persuasion on the issue of harmless error. To create this purported conflict, however, petitioners once again rely on semantic differences in how courts have articulated the standard for finding error harmless or prejudicial, rather than statements about which party has the burden of persuasion. Pet. 9, fn. 2 and 3. As shown above, no matter how the standard is articulated, the appellate court can look to the appellant to persuade it that the standard for finding prejudice has been satisfied. Petitioners demonstrate no conflict on allocation of the burden of persuasion or that the issue is raised by this case. Moreover, given the rather innocuous role of the burden of persuasion in appellate decision-making as described in *Shinseki*, the issue is not sufficiently important to merit review by this Court.

It appears that what petitioners seek is not a proper allocation of the burden of persuasion, but rather a presumption in favor of finding error harmless that would place all risk of uncertainty about the effect of trial error on the appellant. *Id.* Given

that the effect of trial error on a jury can never be known with certainty, this effectively would render almost all errors in jury trials harmless. This Court rejected the use of presumptions and rigid rules in *Shinseki*, in favor of the kind of case-specific exercise of judgment that occurred here:

> We have previously warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based on examination of the record.

Shinseki, 129 S. Ct. at 1704-05. Having just reiterated the case-specific nature of the harmless error question, and the minimal role of the burden of persuasion to that inquiry, there could be no reason for this Court to grant *certiorari* in order to impose a rigid presumption or "burden shifting" procedure on harmless error analysis. Petitioners have raised no issue meriting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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Ford Motor Company offers no persuasive reason why the Court should not remand this case to the court of appeals to allow the court to reconsider its opinion in light of *Shinseki v. Sanders*, 129 S. Ct. 1696 (2009). The court of appeals majority opinion appears to improperly allocate the burden of persuasion to the appellees, and it purports to be unable to determine the effect of the trial court error on the jury's decision. The dissenting opinion properly allocates the burden of persuasion, and it concludes that the error was harmless. A remand to allow the court of appeals to properly allocate the burden of persuasion would serve the interests of justice and judicial economy.

A. *Shinseki* is sufficiently "new" to warrant remanding this case to the court of appeals.

Shinseki is the first case in which this Court has held that the allocation of the burden of persuasion on harmless error in ordinary civil cases differs from that in criminal and habeas corpus cases. Before *Shinseki*, courts of appeals including the Sixth Circuit held that the harmless error rule in criminal and civil cases was the same, *e.g., Stockler v. Garratt*, 974 F.2d 730, 732 (6th Cir. 1992), and applied or purported to apply *Kotteakos v. United States*, 328 U.S. 750 (1946), in civil cases. In *Shinseki*, this Court held for the first time that the allocation of the burden of persuasion on harmless error in civil cases differs from that in *Kotteakos*. 129 S. Ct. at 1706 (citing *Kotteakos* as an example of a criminal case in which the burden of

persuasion is placed on the appellee when the matter underlying review is criminal).

Ford correctly points out that *Shinseki* relies in part on decisions going back to the 1943 case *Palmer v. Hoffman*, 318 U.S. 109, 116, which holds that the party claiming error bears the burden of showing prejudice. (Brief in Opposition, at 1). But this Court has described *Palmer* as a "pre-*Kotteakos*" case involving mere "technical errors." *O'Neal v. McAninch*, 513 U.S. 432, 439 (1995). And as recently as 1995, this Court has suggested that allocation of the risk of appellate uncertainty on harmless error is the same in civil and criminal proceedings. *Id.* at 441-42. Further, as is set out in the Maggard's petition, before *Shinseki*, four federal circuit courts of appeals had held that the appellee in a civil appeal has the burden of persuasion on harmless error. (Petition, at 9, nn.2, 3).

Although *Shinseki* does not involve reversal of any settled precedent, it is sufficiently "new" to warrant remanding this case to the court of appeals for reconsideration.

B. There is a reasonable probability that the court of appeals improperly allocated the burden of persuasion.

Ford points to *Beck v. Haik*, 377 F.3d 624 (6th Cir. 2004), as proof that it is possible to properly allocate the burden of persuasion while using the same articulation of the harmless error standard

used by the court of appeals majority opinion in the pending case. *Beck* states that an appellant must "deprive the appellate court of fair assurance that the error was not outcome determinative." *Id.* at 635. There are at least three problems with Ford's reliance on *Beck*.

First, the question is not whether it is *possible* that the majority opinion properly allocated the standard of review. The question is whether there is a reasonable probability that the majority opinion improperly allocated the burden of persuasion. *See Lawrence v. Chater*, 516 U.S. 163, 167 (1996).

Second, the majority opinion in the pending case does purport to follow *Beck*. The opinion does not cite or quote *Beck*, and it does not include any language indicating that the burden of persuasion is on the appellant. To the contrary, the majority opinion takes its statement of the harmless error standard from *Mike's Train House, Inc. v. Lionel, L.L.C.*, 472 F.3d 398 (6th Cir. 2006), which relies on *DePew v. Anderson*, 311 F.3d 742, 751 (6th Cir. 2002), which relies on *Kotteakos*. In *Shinseki*, this Court held that *Kotteakos*'s allocation of the burden of persuasion on harmless error does not apply in civil appeals. 129 S. Ct. at 1706.

Third, *Beck* actually demonstrates how unnatural it is to use the language "fair assurance that the error was not outcome determinative" when allocating the burden of persuasion to the appellant. The *Beck* articulation is convoluted and difficult to

understand. Aside from the confusing double-negative, it is unclear what exactly it means to have the burden of depriving a court of a fair assurance. The statement has been interpreted to mean that the appellant must "show by something less than a preponderance of the evidence that the error was not outcome-determinative." Harry T. Edwards & Linda A. Elliott, *Federal Standards of Review*, at 87 (2007). But the step below "a preponderance of the evidence" is "equally balanced evidence," at which point the burden of persuasion should be conclusive.

Whether or not the *Beck* standard is intelligible, the relevant point is that the *Beck* articulation of the harmless error standard is unnatural. It is therefore unlikely that the court of appeals in the pending case intended to imply that the appellant has the burden of persuasion when it stated that the question was whether it could say with "fair assurance" that the verdict "was *not* substantially swayed by the error." (App. 19-20) (emphasis added). The more natural articulation when placing the burden on the appellant is that used by the dissent, which asked whether it is likely that the verdict "was" affected by the error. (App. 26-27). When placing the burden on the appellee, the natural articulation is that used in *Shinseki* when the Court refers to "the burden of proving that a notice error did *not* cause harm." 129 S. Ct. at 1706 (emphasis in original). By considering whether the verdict "was not" swayed by the error rather than whether the verdict "was" swayed, the

majority opinion implies that the burden of persuasion is on the appellee.

To establish that a GVR is appropriate, the Maggards need only establish a reasonable probability that the majority opinion applied a standard inconsistent with *Shinseki*. *Lawrence*, 516 U.S. at 167. This degree of probability is established by (1) the difference in the language used by the majority and the dissent in articulating the standard, (2) the difference in the conclusions reached by the majority and the dissent, and (3) the majority opinion's professed inability to determine what effect the error had on the jury.

C. On remand, the court of appeals would have good reason to conclude that the exclusion of the trial testimony was harmless.

In support of its contention that there is a reasonable probability that the court of appeals would reach a different conclusion on remand, the Maggards explained that the excluded testimony supported a theory of how the accident occurred that is inconsistent with Ford's contentions in the final pretrial order and with the opinions of Ford's expert witnesses. In response, Ford changes the subject.

Ford argues in various ways that the excluded evidence was relevant and reliable. (Brief in Opposition, at 1, 4, 6-7). But the Maggards' petition did not

assert that the excluded evidence was irrelevant or unreliable.[1] The Maggards' primary argument is that the excluded evidence is inconsistent with Ford's contentions at trial, including binding judicial admissions. In response, Ford barely acknowledges this argument, referring to "certain arguments advanced by petitioners" and "counter-arguments advanced by petitioners." *Id.* at 7. And Ford does not actually respond to the argument at all, except to note that the court of appeals majority was evidently unpersuaded. *Id.*

Obviously, the question whether exclusion of the trial testimony was harmful or harmless is not appropriate for resolution by this Court at this stage of the proceedings. The question for this Court is whether there is a reasonable probability that *Shinseki* would affect the outcome on remand. *See Lords Landing*

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[1] The record does, however, indicate that Officer Capps' version of Holly Maggard's statements is unreliable. Capps' deposition testimony suggests that he may have developed his theory of the cause of the accident before he spoke to Holly, when he interviewed emergency responders who had not witnessed the accident. In its Memorandum and Order addressing Ford's post-trial motions, the trial court described Capps' recollections as "cloudy," and noted that "[a]lthough, in some places, Office Capps stated that Holly Maggard told him specific things, in other parts of the deposition, he stated that he was not sure who told him what because he was talking to lots of different witnesses in a short timeframe." (November 30, 2007 Memorandum and Order, at 8). Further, in her deposition and at trial, Holly Maggard testified that she did not make the statements that Officer Capps attributed to her.

Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co., 520 U.S. 893, 895-96 (1997). Ford's inability to address the Maggard's primary argument that the error was harmless supports the conclusion that if the court of appeals were to properly allocate the burden of persuasion to Ford, it would resolve its doubts about the effect of the trial error in favor of the Maggards and conclude that the error was harmless.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

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